No. 02-1606

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In The Supreme Court Of The United States

TENNESSEE STUDENT
ASSISTANCE CORPORATION,
Petitioner,

CORRECTED COPY

v.

PAMELA L. HOOD,
Respondent.

ON WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF OF OHIO AND 47 OTHER STATES AND COMMONWEALTHS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF *AMICI* INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

A. The Early History of the Constitution Illustrates That The Founders Understood and Distinguished the Sovereign *Power* of the States from the Sovereign *Immunity* of the States in the Context of Bankruptcy. 6

B. The Early History of Bankruptcy, Together With Modern Case Law, Illustrate That the States Retain Sovereign Immunity Regardless of the Extent of the Power Ceded to Congress... 12

C. The Early History of Bankruptcy Law Illustrates That "Uniform Laws on the Subject of Bankruptcy" Were Not Intended for the "Fresh Start" of Debtor Relief, but for Ease in Regulating Commerce. 14

D. The Early History of Bankruptcy Reveals No Established Practice of Subjecting States to Suit in Bankruptcy. 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases

Alden v. Maine,
527 U.S. 706 (1999) ..... *passim*

Atascadero State Hospital v. Scanlon,
473 U.S. 234 (1985) 4, 8

Blatchford v. Native Village of Noatak,
501 U.S. 775 (1991) 8, 19

Board of Trustees of the Univ. of Alabama v. Garrett,
531 U.S. 356 (2001) 6

Camps Newfound/Owatonah v. Town of Harrison,
520 U.S. 564 (1997) 13

Chisholm v. Georgia,
2 U.S. (Dall.) 419 (1793) 10, 11, 19

City of Boerne v. Flores,
521 U.S. 507 (1997) 6

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,
527 U.S. 666 (1999) 6, 13

Commonwealth v. Hutchinson,
10 Pa. 466 (1849) 20

Page

Connecticut v. Shelton,
47 Conn. 400 (1879) 20

Federal Maritime Commission v. South Carolina Ports Authority,
535 U.S. 743 (2002) 5

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,
527 U.S. 627 (1999) 5

Geery's Appeal,
43 Conn. 289 (1876) 13

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) 10

Griswold v. Pratt,
50 Mass. 16 (1845) 13

Hans v. Louisiana,
134 U.S. 1 (1890) 10, 19, 20

Idaho v. Coeur d'Alene Tribe,
521 U.S. 261 (1997) 6

John McConologue's Case,
107 Mass. 154 (1871) 13

Kimel v. Florida Bd. of Regents,
528 U.S. 62 (2000) 6

Page

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819) 10, 11

Ogden v. Saunders,
25 U.S. (12 Wheat.) 213 (1827) 3, 11, 13

Pennsylvania v. Union Gas Co.,
491 U.S. 1 (1988) 4, 6

People v. Herkimer,
4 Cowen, 348 (N.Y. Sup. 1825) 20

Principality of Monaco v. Mississippi,
292 U.S. 313 (1934) 10

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) ..... *passim*

South Dakota v. Dole,
483 U.S. 203 (1987) 5

Sturgis v. Crowninshield,
17 U.S. (4 Wheat.) 122 (1819) 3, 13

U.S. v. Herron,
87 U.S. 251 (1873) 16, 19, 20

United States v. Fisher,
6 U.S. (2 Cranch.) 358 (1805) 11

Page

Statutes

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Other Authorities

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Elliot, *Debates on the Federal Constitution* 533 (2d Ed. 1854) 7, 8

Federalist Paper No. 32 ..... 4, 8, 9

Federalist Paper No. 42 17

Federalist Paper No. 81 ..... 4, 8, 9

Ferrand, *The Records of the Federal Convention of 1787* (1911) 17

Friedman, *A History of American Law* (1973) 12, 15, 18

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Page

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STATEMENT OF *AMICI* INTEREST

Amici State of Ohio and 47 other States and Commonwealths ("*amici* States") have a vital interest in this case, as it implicates one of the most controversial and publicly-debated legal issues of recent years—the power of Congress to abrogate the States' Eleventh Amendment immunity. The issue is squarely presented here in a context not yet addressed by this Court, but vital to a State's ability to control its fisc: bankruptcy.

The States are frequently creditors, as debtors often owe taxes, fees and other government debt such as the student loans at issue here. In the second quarter of 2003 alone, over 440,000 bankruptcy cases were filed, with over 72%, or almost 318,000 cases filed in Chapter 7. The vast majority of such cases are filed by individuals, in which no distribution is made to creditors. Many of the debts, such as the student loans at issue here, are nondischargeable. The States would have no reason to file claims in such cases, and no need to be involved in cases that may be filed hundreds or thousands of miles away.

But under the Sixth Circuit's view, a debtor may institute a suit against a State and force the State to defend its rights at a time and place solely of the debtor's choosing. Because of the vast number of suits filed each year and the broad venue provisions of the Bankruptcy Code, a State can find itself drawn into litigation all over the country.

In short, bankruptcy suits are particularly onerous for States because they are unpredictable, can occur anywhere in the country, and can involve large sums of money. The State governments, unlike the federal government and other large creditors, do not have offices and counsel in every jurisdiction. The procedural difficulties and costs inherent in being forced into litigation by debtors can greatly burden the public treasury. Without immunity, each State's ability to

control its fisc, and thus direct and manage its policy, planning and financial stability will be significantly impaired.

SUMMARY OF ARGUMENT

In case after case, the Court has affirmed that Congress cannot use *any* of its Article I powers to override the States' Eleventh Amendment immunity. The early history of the Constitution and of bankruptcy law confirms that there is no reason to treat Congress's Article I bankruptcy powers any differently. That history unequivocally demonstrates that the Founders understood that although the States ceded at least some sovereign law-making power in that area, the States retained their full sovereign immunity. The historical evidence indicates no pattern of forcing States to submit to suits by private parties in bankruptcy. Indeed, the Founders' writings and speeches, the debates of the ratifying conventions, public reaction to early case law and the history of bankruptcy and insolvency law all confirm that there is no such pattern, and there is no reason to adopt one.

Moreover, while the States may have ceded their sovereign *power* to legislate, this Court confirmed in *Seminole Tribe of Florida v. Florida* that the extent of the law-making power ceded to Congress in the Constitution is irrelevant to the States' sovereign *immunity*. 517 U.S. 44, 72 (1996). And even if the extent of States' sovereign immunity in a particular area of law were somehow linked to the extent of sovereign power ceded in the plan of the Convention, the States ceded less power in bankruptcy than in other Article I areas.

For instance, the Court has held that Congress's power under the Commerce Clause is so broad that it preempts States from even legislating within its sphere—the

so-called "dormant commerce clause" doctrine. In the bankruptcy context, by contrast, States are allowed to pass—and have passed—insolvency and bankruptcy laws in the absence of federal bankruptcy coverage. *Sturgis v. Crowninshield,* 17 U.S. (4 Wheat.) 122 (1819); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827). Thus, the Court's established precedent, which rejects abrogation in the Commerce Clause context, forecloses it here.

Finally, policy arguments that state sovereign immunity interferes with the "fresh start" that is central to modern bankruptcy law are equally unavailing. At the time of the Convention, bankruptcy law did not include a "fresh start" principle; rather, the model for bankruptcy law was the English Statute of George II. 5 Geo. 2, Ch. 30 (1732). Under that statute, bankruptcy was entirely involuntary, applied only to merchants, and allowed for discharge only rarely. Insolvency laws—those designed to give relief to honest, non-merchant debtors at their request—were the only laws applicable to most debtors. Insolvency laws often allowed release from debtor's prison, but did not provide a discharge from liability on the underlying debt.

The nineteenth century developments in bankruptcy law reflect a long-lasting and contentious debate about the wisdom and constitutionality of including fresh start principles in the federal bankruptcy law. The issue was not resolved until the passage of the 1898 bankruptcy act—over a century after the Constitution was ratified. Thus, the Founders could not have had in mind these "fresh start" principles when they included the Bankruptcy Clause in the Constitution, and they could not have intended a non-existent policy to overrule the States' immunity from suit.

The *amici* States do not assert that the federal government is powerless to pass laws allowing for a "fresh

start," and certainly do not advocate a return to early English bankruptcy principles and practices. The *amici* States do contend, however, that late nineteenth-century amendments to bankruptcy statutes cannot serve to change a clear constitutional understanding about structural limits on congressional power.

ARGUMENT

Despite overwhelming precedent to the contrary, the Sixth Circuit below adopted an obsolete and discredited theory of sovereign immunity. Under the Sixth Circuit's rationale, the States gave up not only their sovereign *power* to legislate in the area of bankruptcy, but their sovereign *immunity* from suit in federal bankruptcy court, in the plan of the Constitutional Convention. This idea is nothing new—it was the rationale behind the now-defunct plurality opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1988), holding that Congress could abrogate the States' sovereign immunity under the Commerce Clause. It was also the basis for the dissent in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 277-78 (1985), which found support in precisely the same conjunction of *Federalist Papers* 81 and 32 that the Sixth Circuit relied on below. However, that argument was expressly overruled in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

In fact, in case after case, the Court has affirmed that Congress cannot use *any* of its Article I powers to override the States' Eleventh Amendment immunity. The *Seminole Tribe* opinion in particular makes two points central to the *amici* States' position here. First, the extent of law-making power ceded to the federal government is irrelevant to the retention of sovereign immunity by the States. "[T]he Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area that is under the

exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe*, 517 U.S. at 72-73. This passage is followed by footnote 16, which specifically mentions bankruptcy laws in the Eleventh Amendment context. *Id.* at 73, n.16. ("it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity.")

Second, the *Seminole Tribe* Court held that Article I did not give Congress the power to overcome sovereign immunity. "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.*[1]

And numerous cases since *Seminole Tribe* have reiterated its principles with regard to other Article I clauses and laws passed under their authority. *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 627, 636 (1999) (Patent Clause); *Alden v. Maine*, 527 U.S. 706 (1999) (Fair Labor Standards Act); *Bd.*

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[1] Similarly, the fact that bankruptcy courts are authorized under Article I rather than Article III gives Congress no power to overcome the States' sovereign immunity. Congress cannot circumvent the limitations placed on Article III courts by creating Article I courts. *See Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 756-767 (2002).

Nor is it relevant that Congress can make debts such as student loans dischargeable, thus forcing the States to choose between waiver and loss of the debt. As with the Spending Clause cases, a State would still have a choice between waiving and exercising its immunity. *South Dakota v. Dole*, 483 U.S. 203, 207-211 (1987).

of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356, 364 (2001) (Americans with Disabilities Act). *See also City of Boerne v. Flores*, 521 U.S. 507 (1997); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666 (1999); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 79 (2000).

As we demonstrate below, the historical background of the Bankruptcy Clause and early American bankruptcy law, as well as the history of the Eleventh Amendment, make clear that the *Union Gas* rationale has no more viability under the Bankruptcy Clause than it does under the Interstate Commerce, Indian Commerce or Patent clauses.

A. The Early History of the Constitution Illustrates That The Founders Understood and Distinguished the Sovereign *Power* of the States from the Sovereign *Immunity* of the States in the Context of Bankruptcy.

In addition to the overwhelming precedent holding that the States retained sovereign immunity from suit at the same time they alienated sovereign power to pass laws in those areas of law enumerated in Article I, the early history of the Constitution and of bankruptcy law illustrates the founders' understanding that the States retained sovereign *immunity* in bankruptcy, while having ceded at least some sovereign law-making *power* in that area.

A comprehensive picture of the founders' intent and understanding of State sovereign immunity at the time of the debates and ratification of the Constitution has been well

documented. *Alden v. Maine*, 527 U.S. at 716-724. That history will not be repeated in detail, except to make the following points.

1. The founders' writings and speeches demonstrate that the general understanding of the time was that States would continue to enjoy sovereign *immunity* from suit in all areas of law, despite having alienated their sovereign *power* in some areas. *Alden*, 527 U.S. at 716-724. Indeed, advocates of the Constitution repeatedly assured the people "in no uncertain terms that the Constitution would not strip the States of sovereign immunity." 527 U.S. 716.

For instance, at the ratifying conventions, supporters assured the States that they could not be sued in federal court. Both James Madison and John Marshall spoke at the Virginia ratifying convention, supporting the understanding that a State would not be sued without its consent. *Alden*, 527 U.S. 717-18; 3 Elliot, *Debates on the Federal Constitution* 533, 555 (2d Ed. 1854). The New York and Rhode Island conventions expressly proclaimed their understanding that the Constitution did not allow private persons to sue the States. 527 U.S. 718-19; 1 *Debates* at 336, 329.

Nor, as suggested by the Sixth Circuit, 319 F.3d at 767, is it particularly remarkable that suits in bankruptcy were not specifically mentioned in the ratification debates. Indeed, there was no debate in the ratification conventions about the States' sovereign immunity under the Patent Clause, the Indian Commerce Clause or any other specific part of Article I. For instance, John Marshall spoke of lawsuits in general, and not about specific causes of action. 3 *Debates* at 533. With the exception of general areas of law, such as "chancery, admiralty and common law," 3 *Debates* at 555, the debaters spoke in generalities about civil lawsuits and state sovereignty. The statements of Patrick Henry and

Edmund Pendleton, cited by the court below, are not to the contrary. 3 *Debates*, 539-546 (statement of Patrick Henry); 3 *Debates* 549 (statement of Edmund Pendleton). While Henry disagreed with some of Marshall's statements about the federal judiciary, he also spoke in generalities about lawsuits, and not about specific causes of action.

As the Court has noted, "[I]n excercising its Article I powers, Congress may subject the States to private suits . . . only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." *Alden*, 527 U.S. at 730, *citing Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991). The absence of a discussion on bankruptcy and sovereign immunity does not constitute the "compelling evidence" necessary to show that the States surrendered immunity in the constitutional design.

2. The Sixth Circuit's reliance on a conjunction of the *Federalist Papers* Nos. 81 and 32 is equally misguided. In the *Federalist Papers*, Alexander Hamilton was careful to distinguish "an alienation of State sovereignty"—by which he meant legislative authority, and which he had discussed extensively in the *Federalist* No. 32—from State sovereign immunity from suit, which he discussed in *Federalist* No. 81. Contrary to the assertions of the Sixth Circuit (and of the dissent in *Atascadero*), Hamilton's reference to an alienation of state sovereignty in *Federalist* No. 32 was not intended to include an alienation of sovereign immunity in some areas of law.

A close reading of *Federalist* No. 81 indicates that Hamilton was carefully separating the two concepts. Hamilton first introduced the subject of sovereign immunity: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." He went on

to state that this immunity is enjoyed by every State, and will exist unless it is surrendered in the Constitution: "[u]nless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . ." *Federalist* No. 81. In other words, if the Constitution does not take away sovereign immunity, it remains with the States.

Hamilton then pointed out that the subject of States alienating sovereign *power*—that is, the ability to pass laws on a particular subject—had been discussed in *Federalist* No. 32: "The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here." Hamilton went on to conclude that despite this alienation of sovereign *power*, the States' sovereign *immunity* remained: "A recurrence to the principles there established [*i.e.*, principles established in *Federalist* 32's discussion of sovereign power] will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan [*i.e.*, the adoption of a plan that alienates state law-making power over some areas of law], be divested of the privilege of paying their own debts in their own way . . . ." *Federalist* No. 81.

In *Federalist* No. 81, Hamilton sought to quell the fear that sovereign immunity *in any context* would be given up if the Constitution were ratified, and so distinguished the States' alienation of limited law-making *power* to Congress—discussed in *Federalist* No. 32—from the States' retention of sovereign *immunity* to suit in federal courts—discussed in *Federalist* No. 81. If he were not distinguishing the two concepts, his concluding statement would either be a logical *non sequitur*, or intentionally deceptive. The Court has long assumed that Hamilton meant what he said—ceding legislative *power* has no effect on sovereign *immunity*.

3. Public reaction to early case law also illustrates that the founding generation understood the distinction between the alienation of sovereign power in certain areas—which it accepted—and a surrender of sovereign immunity—which it did not. To repeat the oft-told tale, when, just five years after the Constitution was ratified, the Supreme Court held in *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1793), that a private citizen of another State could sue the State of Georgia, the decision "fell upon the country with a profound shock." *Alden*, 527 U.S. at 720, quoting 1 Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926); *accord, Hans v. Louisiana*, 134 U.S. 1, 11 (1890); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 325 (1934); *Seminole Tribe*, 517 U.S. at 69. The press responded with outrage. *Alden*, 527 U.S. at 720. It took Congress just one day to introduce a proposal to amend the Constitution to reverse *Chisholm*'s result. 527 U.S. at 721, citing 4 *Annals of Congress* 25, 30, 477, 499 (1794). The Eleventh Amendment was eventually passed with only one day's debate in each house of Congress. *Alden*, 527 U.S. at 721, citing 4 *Annals* at 30-31, 476-78.

Yet, while there was no doubt a lively debate about the topic at the time, the early cases delineating supreme federal law-making *power* (as opposed to the States' sovereign *immunity*) did not result in the constitutional crisis precipitated by *Chisholm*. For instance, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the Court struck down a Maryland tax law as being in conflict with federal power. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the Court struck a New York law as being in conflict with the federal commerce power. Neither of these decisions engendered the controversy surrounding *Chisholm*.

Perhaps most important here, the Court upheld federal legislation giving the United States priority in settling the

debts of insolvent estates under the first federal bankruptcy law. *United States v. Fisher*, 6 U.S. (2 Cranch.) 358 (1805). Although *Fisher* did not directly involve a state law, the case raised a claim that such a priority would "interfere with the right of the state sovereignties respecting the dignity of debts," and would "defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers." The Court held that the States ceded their sovereign power in the field of bankruptcy, explaining that:

> [T]his is an objection to the constitution itself. The mischief suggested . . . is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends.

6 U.S. (2 Cranch.) at 397.

Thus, only a few years after *Chisholm* and the final ratification of the Eleventh Amendment, the Court issued ground-breaking opinions establishing the supremacy of federal law, including the federal law of bankruptcy. Yet *Fisher*, *McCulloch* and *Ogden* did not "[fall] upon the country with a profound shock" as did *Chisholm*. No alacritous move to amend the Constitution followed these early decisions. The States accepted the loss of law-making power to the federal government in the limited areas spelled out by the Constitution, while they most emphatically had not accepted a loss of sovereign immunity in any area enumerated in Article I.

B. The Early History of Bankruptcy, Together With Modern Case Law, Illustrate That the States Retain Sovereign Immunity Regardless of the Extent of the Power Ceded to Congress.

Arguments by Hood and her *amici* have as an unstated assumption that the extent of Congressional law-making power reflects the extent of Congressional power to abrogate sovereign immunity. As mentioned above, however, *Seminole T ibe* expressly rejected that proposition, holding that the extent of the law-making power ceded to Congress in the Constitution is irrelevant to the States' sovereign immunity. 517 U.S. at 72. But even if the extent of States' sovereign immunity in a particular area of law were somehow linked to the extent of sovereign power ceded in the plan of the Convention—which the *amici* States do not concede—the States arguably ceded *less* power in the area of bankruptcy than in other Article I areas such as commerce.

Even though the Constitution granted Congress the power to enact a federal law of bankruptcy, Congress did not immediately or consistently exercise its power, so the country went through many periods during the early years of the Republic with no national bankruptcy laws. Duncan, *From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law*, 100 Commercial L. J. No. 2, 191, 218-19 (1995) ("Duncan"); Friedman, *A History of American Law*, 238-40 (1973); Cordry, *Seminole Seven Years On*, in 2003 Annual Survey of Bankruptcy Law, William L. Norton, Jr., Ed. (Thompson-West) pp. 401-409 ("Cordry"). In general, each federal bankruptcy act was passed in reaction to a specific economic crisis, and was quickly repealed when the crisis was over. Friedman at 238-40. The first two bankruptcy acts, passed in 1800 and 1841, were repealed in haste, and generally disliked. *Id.* at 238. Another law was passed in 1867, "though by the merest hair, and over bitter

opposition." *Id.* at 480. This Act was also repealed in 1878. Finally, in 1898 a bankruptcy act was passed that survived until the modern revisions in 1978.

During the lengthy periods with no federal bankruptcy law, debtors and creditors relied on state bankruptcy and insolvency laws, despite some controversy as to whether they were preempted by the Bankruptcy Clause. Friedman at 274; Duncan at 216, 219-220. The Supreme Court laid the preemption issue to rest in *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819), and later in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827); *see*, Duncan at 219-20.

The *Sturgis* and *Ogden* Courts held that there was no dormant bankruptcy power, and in the absence of superseding national bankruptcy laws, state bankruptcy and insolvency laws were valid, if they did not violate the Contracts Clause. 17 U.S. (4 Wheat) at 196; 25 U.S. (12 Wheat.) at 268. *See also Geery's Appeal*, 43 Conn. 289 (1876); *Griswold v. Pratt*, 50 Mass. 16 (1845); *John McConologue's Case*, 107 Mass. 154 (1871). Some state courts went so far as to hold that state "involuntary insolvency" laws were available to creditors *even when* a federal bankruptcy law was in place, providing there was no conflict between the state law and the national bankruptcy law. *Geery's Appeal*, 43 Conn. at 299.

In contrast, the Interstate Commerce Clause carries with it a "dormant" power—that is, States are precluded from passing laws in the area, even if Congress has not done so. *See Camps Newfound/Owatonah v. Town of Harrison*, 520 U.S. 564, 571-72 (1997), and cases cited therein. Yet, the Court has held that the States did not alienate their sovereign immunity in the context of the Commerce Clause. *College Savings Bank*, 527 U.S. 666.

Indeed, the *Seminole Tribe* Court held that the States have even less power over Indian commerce than they do over Interstate Commerce. 517 U.S. at 62. Yet the *Seminole Tribe* Court held that the States have sovereign immunity in the area of Indian commerce. "[T]he background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government." 517 U.S. at 72. In other words, the extent of the power ceded to Congress is irrelevant—the States enjoy sovereign immunity from suit in federal court regardless of the particular Article I power exercised by Congress.

Therefore, the early history of the Constitution and of bankruptcy laws, together with more recent case law, demonstrates that Congress's power to abrogate immunity in bankruptcy court is no more potent than it is with regard to any other Article I power.

C. The Early History of Bankruptcy Law Illustrates That "Uniform Laws on the Subject of Bankruptcy" Were Not Intended for the "Fresh Start" of Debtor Relief, but for Ease in Regulating Commerce.

Policy arguments that state sovereign immunity interferes with the "fresh start" that is central to modern bankruptcy law are equally unavailing. The early history of the Constitution and of bankruptcy law indicate that a "fresh start" for debtors was not in the contemplation of the Founders when passing the Bankruptcy Clause, but was a concept that gained acceptance as part of bankruptcy only much later. These later statutory changes, however, are entirely insufficient to upset settled constitutional principles.

At the time of the Convention, the model for bankruptcy law was the English Statute of George II, passed in 1732. 5 Geo. 2, Ch. 30 (1732). This law served, in many respects, as the model for the first American bankruptcy act, passed in 1800. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am Bankr. Inst. L. Rev. 5, Spring 1995, p. 9 ("Tabb, 1995"). *See also* Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 326, 345 (1991) ("Tabb, 1991"); Friedman at 238.

Early English bankruptcy law had a specific meaning, much narrower than the actions that now fall within the definition of "bankruptcy." Bankruptcy law was designed specifically as a creditor's remedy that applied only to merchant debtors, did not provide for discharge from debt liability, and could be initiated only by a creditor. Tabb, 1991 at 327-333; Cordry, at 343-95. Historically, debt was looked upon as immoral and almost fraudulent, except in commerce, where it was viewed as a necessary evil. Tabb, 1991 at 335; Tabb, 1995 at 9.

The idea of any kind of relief from collection efforts for the benefit of an honest debtor did not even appear in English law until the Statute of Anne, passed in 1705. Tabb, 1991 at 333; 4 Anne ch.17 (1705); Cordry, at 398-99. The main focus of the Statute of Anne remained on assisting creditors. Bankruptcy was exclusively non-voluntary, as only a creditor could file a bankruptcy petition. A debtor could get a discharge only if the commissioners consented. Only a year later, an amendment made a discharge contingent on creditor consent. Many debtors were thus prevented by vindictive creditors from obtaining discharge. Tabb, 1991 at 333-340; Tabb, 1995 at 10-12.

The Statute of George II was a comprehensive codification and revision of English bankruptcy law, but enacted few debtor-friendly reforms. 5 Geo. 2, Ch. 30 (1732); Tabb, 1991 at 340. Various draconian penalties against fraudulent bankrupts were kept, and a debtor could obtain a discharge only by consent of the commissioners and creditors. Various non-merchants were expressly excluded from bankruptcy, notably farmers and others engaged in agriculture. Tabb, 1991 at 340-343. Non-merchants were completely ineligible for discharge, which could be obtained only in bankruptcy. Tabb, 1991 at 343.

At the same time, insolvency laws—that is, laws designed to give some relief to honest non-merchant debtors—were sporadically passed, but were often ineffective and rarely provided a discharge from debts. Tabb, 1995 at 12. Usually they were passed as a reaction to overcrowding in debtors' prisons. Duncan at 215.

The delegates to the Convention were well aware of English bankruptcy law, and the difference between bankruptcy and insolvency laws. Tabb, 1991 at 340. When they inserted the Bankruptcy Clause in the Constitution, they had in mind the Statute of George II: involuntary bankruptcy asserted and controlled by creditors against only merchant debtors, with no guarantee of a discharge. *Id.* In addition, they would have envisioned a statute that did not discharge debts owed to the government. *United States v. Herron*, 87 U.S. 251, 255 (1873).

The context of the debates in the Convention and the one mention of bankruptcy in the *Federalist Papers* also reveal that the founders had merchants and commercial concerns in mind when they inserted the Bankruptcy Clause in Article I. A bankruptcy clause was suggested in the context of debate about the Full Faith and Credit Clause. *See*

1 Debates at 280-281; Ferrand, *The Records of the Federal Convention of 1787* (1911) at 483-486 ("Ferrand"). This was principally because the individual States enacted differing state laws governing insolvency and bankruptcy. These state laws, and the judgments rendered under them, had no effect in a forum beyond the State in which they were filed. Tabb, 1995 at 13; Tabb, 1991 at 344-45. This led to "many frauds where the parties or their property may lie or be removed into different states." *Federalist Paper* No. 42. Thus, because the founders sought to prevent these "many frauds," and because they saw that uniform bankruptcy laws were "intimately connected with the regulations of commerce"—and *not* because they wished a "fresh start" for debtors—they included the Bankruptcy Clause in Article I. *Id.*

This understanding of bankruptcy is illustrated by the first bankruptcy act, which was passed in 1800, and that closely followed the English law at the time. Tabb, 1995 at 15; Duncan at 218. Between 1789 and 1800, advocates of national bankruptcy law—primarily those from the commercial North--struggled to enact a law similar to the English model, and were bitterly opposed by Jeffersonian agricultural interests, who saw the law as a Federalist scheme to commercialize the country. Duncan at 218. The 1800 act was repealed in the early years of the Jefferson administration.

Indeed, the nineteenth century history of bankruptcy law consisted of a long-lasting and contentious debate about, among other things, whether Congress could constitutionally pass what was considered an insolvency law under the guise of "bankruptcy." Tabb, 1995. at 15-23; Tabb, 1991 at 350-51. When a debtor-friendly "bankruptcy" law allowing voluntary filing, and applying to merchants and non-merchants alike was passed in 1841, it caused a "firestorm of

controversy," on both policy and constitutional grounds. Tabb, 1991 at 350. The law lasted less than two years. *Id.* at 351; Cordry at 405.

Another federal bankruptcy law was narrowly passed in 1867, with more significant changes to help the honest debtor. Tabb, 1991 at 354-56; Duncan at 480. However, constitutional questions about some of these pro-debtor changes were again raised. Tabb, 1991 at 361; Cordry at 407. The 1867 law was repealed in 1878.

The question of the constitutionality of a federal insolvency law was never put to the Supreme Court, and remained unresolved until 1898, when the first "modern" bankruptcy law was passed. Tabb, 1995 at 23-25; Tabb, 1991 at 362-363; Friedman at 482. The act of 1898 was an amalgam of insolvency and bankruptcy concepts; it applied to merchants and non-merchants, allowed both voluntary and involuntary bankruptcies, and provided for discharge of honest debtors. Tabb, 1995 at 23-25; Friedman at 482. It remains the basis for the modern concept of a "fresh start" for the honest debtor.

Of course, the *amici* States do not assert that the federal government is powerless to pass laws allowing for a "fresh start," and certainly do not advocate a return to early English bankruptcy principles and practices. However, the historical evidence clearly demonstrates that the founders did not have in mind the "fresh start," of the relief from debt for an honest debtor of the modern bankruptcy system when they included the Bankruptcy Clause in the Constitution. Instead, they contemplated a more efficient system for creditors to have their debts paid by merchant debtors and more ease in regulating commerce.

Late nineteenth-century amendments to bankruptcy statutes are entirely insufficient to change a clear constitutional understanding about sovereign immunity and structural limits on congressional power. Policy arguments asserting that the States must have ceded sovereign immunity in the plan of the Convention to allow debtors a "fresh start" are therefore misguided.

D. The Early History of Bankruptcy Reveals No Established Practice of Subjecting States to Suit in Bankruptcy.

In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court held that the Constitution was not intended to create unusual or unheard of suits that did not exist at the time of the ratification. There was "a presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the Constitution was adopted." 134 U.S. at 18; *see, also, Blatchford*, 501 U.S. at 781. In other words, absent an established pattern of allowing suits against the States at or near the time of the ratification, the States are presumed to retain their sovereign immunity. The history of bankruptcy reveals no such established pattern.

Under neither bankruptcy nor insolvency laws in pre-revolutionary England was there any indication that the sovereign could be involuntarily sued. Debts owed to the Crown were not subject to discharge under either the Statute of Anne or the Statute of George II. Longstanding principles of English statutory interpretation dictated that no statute was presumed to cover the Crown unless clear reference of such an intention was made, and therefore the Crown was exempt from suit under the laws. *Herron*, 87 U.S. at 255.

As mentioned above, Congress waited 13 years after the ratification of the Constitution to enact the first bankruptcy law. By this time, *Chisholm* had already "[fallen] upon the country with a profound shock," and the Eleventh Amendment had already been proposed, passed and ratified.

The law of 1800 closely resembled the Statute of George II, with one difference significant here: it specifically precluded the impairment of debts owed to the United States or to a State. Tabb, 1991, 346-47. Although later bankruptcy laws did not include such language, the Court held that these laws did not discharge debts to the United States and noted with approval a similar application to the States by state courts. *U.S. v. Herron*, 87 U.S. 251, 260-62 (1873), citing *People v. Herkimer*, 4 Cowen 348 (N.Y. Sup. 1825), and *Commonwealth v. Hutchinson*, 10 Pa. 466 (1849). *See also Connecticut v. Shelton*, 47 Conn. 400 (1879).

Moreover, after almost a century with no long-lasting federal bankruptcy law, Congress passed the first comprehensive and permanent bankruptcy law in 1898. *See* King, *Collier on Bankruptcy* (15th Ed. 1979), Vol. A, Pt. 3. Only eight years before, the Court had issued *Hans*—which held that a State enjoys sovereign immunity from suits by citizens of any State, and firmly and finally established the States' sovereign immunity from suit in federal court. Despite the currency of the *Hans* case, no provision of the 1898 bankruptcy act hints that the *Hans* doctrine should be ignored in the area of bankruptcy. And contemporary commentators make no mention of State sovereign immunity in the bankruptcy act, despite criticism of many aspects of the new law. *See, e.g.*, Hotchkiss, *Bankruptcy Laws, Past and Present*, The North American Review, Vol. 167, Issue 504, November 1898, pp. 580-591. In fact, it was almost two hundred years after the Constitution was ratified, in 1978, before Congress attempted to abrogate the States' sovereign

immunity in bankruptcy court. Thus, there is no evidence of any understanding at the time that the States were giving up sovereign immunity in the area of bankruptcy "in the plan of the convention."

Therefore, the plan of the convention and the early histories of Eleventh Amendment jurisprudence and bankruptcy law clearly establish no tradition of private suits against the States. To the contrary, history shows an understanding that the States "retain the dignity" of sovereign immunity "though not the full authority" of independent sovereigns with regard to *all* Article I powers—including bankruptcy. *Alden*, 527 U.S. at 715.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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